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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

JEROME JAMES HENDERSON,

Defendant and Appellant.

B207040

(Los Angeles County
Super. Ct. No. MA030601)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Charles A. Chung, Judge. Affirmed.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jason C. Tran and Stephanie C. Brennan, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

INTRODUCTION

Jerome James Henderson appeals from his conviction of possession and transportation of controlled substances (codeine, marijuana, cocaine base & methamphetamine), and furnishing a minor with controlled substances. He contends that judicial misconduct amounted to a denial of due process, and that his conviction of possession of codeine was unsupported by substantial evidence. Henderson also contends that his conviction of possession of cocaine and methamphetamine must be reversed, because he was also convicted of transporting the same drugs. Finally, Henderson contends that he was denied his Sixth Amendment right to counsel, and that prejudice must be presumed, because retained counsel was unprepared to represent him at sentencing. We reject Henderson's contentions and affirm the judgment.

BACKGROUND

1. *The Charges and Verdicts*

An amended information, consolidating charges previously filed, was filed February 20, 2007, alleging 10 offenses committed between December 21, 2004, and November 1, 2006. The information alleged that on December 21, 2004, Henderson unlawfully possessed the following controlled substances: codeine (count 1), in violation of Health and Safety Code section 11350, subdivision (a); and less than 28.5 grams of marijuana (count 2), in violation of Health and Safety Code section 11357, subdivision (b).¹ Count 3 alleged that on April 21, 2005, Henderson was in possession of stolen property in violation of Penal Code section 496, subdivision (a). The information included a special allegation, pursuant to Penal Code section 12022.1, that the offense alleged in count 3 was committed while Henderson was out of custody on his own recognizance.

The information also alleged that on November 1, 2006, Henderson furnished controlled substances to a minor -- cocaine base and MDMA/methamphetamine (counts 4

¹ All further statutory references are to the Health and Safety Code, unless otherwise indicated.

& 5), in violation of sections 11353 and 11380, subdivision (a), respectively. It was alleged that on November 1, 2006, Henderson possessed for purposes of sale the following controlled substances: cocaine base (count 6), methamphetamine (count 7), and marijuana (count 8), in violation of sections 11351.5, 11378, and 11359, respectively. Count 9 alleged that Henderson unlawfully transported the cocaine, in violation of section 11352, subdivision (a), and count 10 alleged that he unlawfully transported the methamphetamine, in violation of section 11379, subdivision (a). A special allegation charged that the offenses alleged in counts 4 through 10 were committed while Henderson was out of custody on his own recognizance.

With regard to counts 1 and 3 through 10, the information alleged that Henderson had a prior conviction of robbery in 1989, which was a serious or violent felony for purposes of sentencing under California's recidivist statutes.

The trial court granted Henderson's motion for acquittal of the receiving stolen property charge (count 3), pursuant to Penal Code section 1118.1. The prosecution elected not to proceed on the special allegations that Henderson committed the present offenses while out of custody on his own recognizance. On March 12, 2007, the jury returned guilty verdicts on counts 1, 2, 4, 5, 9, and 10 as charged in the information, but found Henderson guilty of lesser included offenses of those charged in counts 6, 7, and 8. The lesser included offenses were, as to count 6, a violation of section 11350, subdivision (a) -- possession of cocaine base; as to count 7, a violation of section 11377, subdivision (a) -- possession of methamphetamine; and as to count 8, a violation of section 11357, subdivision (b) -- possession of 28.5 grams of marijuana, or less. Trial on the alleged prior felony conviction had been bifurcated, and, after Henderson waived his right to a jury trial on the prior, the court found the allegation to be true.

2. Trial

On December 21, 2004, Los Angeles County Sheriff's Deputies served a search warrant at Henderson's residence at West Avenue J-2 in Lancaster. Just before the deputies broke down the front door with a battering ram, Henderson could be seen

through an open window, running toward the bathroom. Once inside, deputies heard the toilet flush, and used the battering ram to knock the toilet off its setting, revealing a small plastic bag of marijuana. On the kitchen table, the deputies found bills and mail addressed to Henderson at West Avenue J-2. From the top of the refrigerator, they recovered a plastic pill bottle with the prescription label torn off. One tablet was later tested and found to contain acetaminophen and codeine. The deputies also recovered a scale.

There were three other people in the apartment when the deputies entered, two men and a woman. The woman, Sharmaine Crandall, was found sleeping in an upstairs bedroom. Henderson testified in his defense that the scale was not his, but must have belonged to Crandall, who occasionally stayed with him for a few days at a time to watch the apartment while he was gone. Henderson testified that he had no idea how the acetaminophen and codeine tablets came to be in his apartment, but then testified that his friend Archie Brown had told him that they belonged to him. He claimed that Brown had helped him move in just 10 days before and suffered back pain.

A second search warrant was served at Henderson's residence on April 21, 2005. Deputies recovered keys in the apartment, with which they unlocked padlocks on garages attached to the unit. They found the remains of a fairly stripped vehicle that had been reported stolen.

A third warrant was served October 21, 2005. Deputies found a small amount of cocaine base, some marijuana, a carpet cleaning machine that had been reported stolen, and an electronic digital gram scale of the sort often used by sellers of narcotics. Approximately \$2,300 in cash was found in Henderson's possession. The condition in which the cash was found -- crumpled into groups of small denominations -- was consistent with proceeds of narcotics sales.

November 1, 2006, Henderson was arrested after sheriff's department narcotics investigators observed him engage in what appeared to be a narcotics transaction with persons who walked or drove up to Henderson's car while he sat in it. After Henderson

drove away, deputies followed and observed him hand a plastic bag to his juvenile passenger, J.P., and then reach down as though putting something under the seat. Other deputies made a traffic stop, discovered a warrant for Henderson's arrest, arrested him, and then searched his car and person. A plastic bag containing marijuana was found under the driver's seat. To avoid being searched, Henderson's 16-year-old passenger turned over bags of cocaine and methylenedioxy methamphetamine (ecstasy) that she had hidden in her underwear. She told Detective Richard Ellis that Henderson had given her the drugs. Zimmerman testified that due to the quantity of the drugs and the manner in which they had been packaged, it was his opinion that they were intended for sale.

Other than himself, Henderson's defense witnesses included a friend, Eboni Prescott, who testified that Henderson had been with her November 1, 2006, and went out just before his arrest in order to purchase marijuana for his own use. In addition, Henderson's expert witness, former Sheriff Deputy Felix Dumico, testified that the quantities of the marijuana and cocaine recovered November 1, 2006, were too small to suggest possession for purposes of sale.

3. *Sentencing and Assistance of Counsel*

After Henderson was convicted on March 12, 2007, he retained private counsel, Ronald White, to represent him at sentencing. When Mr. White substituted in, he requested and obtained a continuance of approximately two months, in order to file a motion for new trial. Two months later, another attorney appeared on White's behalf to request another continuance. Henderson waived his right to speedy sentencing, and the matter was continued to July 27, 2007. On that date, when another attorney appeared in place of White, the court put the matter over one week and asked Henderson to tell White that he must appear personally. Henderson again waived his right to speedy sentencing. One week later, still another attorney appeared for White, telling the court that White was in trial in another department. Henderson waived his right to speedy sentencing, and the matter was continued to September 14, 2007.

On September 14, 2007, another attorney appeared for White. The court indicated that its court reporter had telephoned White numerous times regarding the transcript he ordered, but he had failed to return any of her calls. The court indicated that White was still in trial and claimed he had not received the file from trial counsel Peter Swarth. Henderson waived his right to speedy sentencing, and, indicating that it would be the last time, the court continued the matter to December 7, 2007.

White did not appear December 7, 2007, and no other attorney stood in for him. Although White had ordered transcripts, he continued to fail to return the court reporter's telephone calls. The trial judge personally left a voice message at White's office number, as well as a message on his pager and another number he had for White, but received no response. The court offered to substitute Swarth back into the case or to appoint other counsel for Henderson, but Henderson replied that he still wished to be represented by White. Over the prosecution's objection, the court agreed to continue sentencing to January 11, 2008, and Henderson again waived his right to speedy sentencing. Attorney Michael Kelly then arrived, appearing for White, and, after the court gave Henderson some time to confer with him, Henderson once again waived his right to speedy sentencing. The court told Kelly to inform White that any further requests to continue would have to be in writing.

White appeared on January 11, 2008, but had not filed a motion for new trial. He explained that he was originally retained by Henderson's brother, Charles, who later moved to Georgia after his business failed. Further, White represented that he had been occupied by other trials, he had been diligent in attempting to obtain transcripts, and that Swarth did not forward his file to White until the end of November 2007. White requested the court to provide transcripts, as neither Henderson nor his brother was able to pay for them. White denied that he had failed to return the court reporter's calls, representing that he learned early in his representation of Henderson that the transcripts would cost over \$2,000.

The court found that White had not been diligent in obtaining transcripts, and that he could have raised the issue of indigence much earlier. The court proceeded with sentencing, asking whether there was any other reason White believed Henderson should not be sentenced that day. White replied: “I don’t even know what counts Mr. Henderson has been convicted of. I do not have the benefit of knowing what the trial was about so that I can argue factually facts which occurred within the trial in order to do those things.” Because he had been hired to file a motion for new trial, but could no longer do so, White asked the court to have Swarth appear the following week to argue the matter. The court denied the request, noting that Henderson had been given the opportunity to have new counsel appointed, including Swarth, but chose to continue to retain White. After pronouncing sentence, however, the court realized that it had forgotten to ask White whether he would agree that the court could use the probation report of January 24, 2006, for sentencing purposes. When White refused, the court continued the sentencing hearing to January 28, 2008, and referred the matter to the probation department for a sentencing report.

On January 28, White appeared. When given the opportunity to address further argument to the court, White represented that he had calculated Henderson’s custody credits to be 454 actual days, but otherwise submitted the matter on the arguments made January 11, 2008.

The court denied probation and sentenced Henderson to a total of 12 years in prison. The court selected the middle term of six years in prison as to count 4 (furnishing cocaine base to a minor), and doubled it as a second “strike” due to Henderson’s prior felony conviction.² The court imposed the middle term of two years in prison as to count 1, to run concurrently with the sentence on count 4. As to count 2, the court imposed a fine, but suspended it. The court chose the low term of three years as to count 5; 16 months as to each of counts 6 and 7; three years as to count 9; and two years

² See Penal Code, sections 667, subdivision (e)(1) and 1170.12, subdivision (c)(1).

as to count 10, all to run concurrently with count 4. As to count 8, the court imposed six months in any institution, to run concurrently with count 4. Further, the terms imposed as to counts 5 through 10 were stayed pursuant to Penal Code section 654, with the stay to become permanent upon completion of the sentence for count 4. Henderson filed a timely notice of appeal March 27, 2008.

DISCUSSION

1. *Judicial Misconduct*

Henderson contends that the court repeatedly belittled defense counsel in front of the jury, making unwarranted comments and disparaging defense counsel's competence, performance, and professionalism, rendering the trial so unfair as to violate his right to due process.³

On March 5, 2007, the sixth day of jury trial, defense counsel, Swarth objected to a prosecution question as misstating the evidence. After objecting and stating the ground, Swarth said, "That is not the testimony." The prosecuting attorney, Mr. Evans, argued, "That is the testimony." The court stopped counsel, saying, "All right, counsel, let's get this straight, both of you. Neither of you are new to this. Both of you know the rules." The court then said to the jury, "Ladies and gentlemen, I told you at the beginning that certain conduct was unprofessional and should not be done in court. You have now seen what should not be done in court. Let me explain to the attorneys what should be done in court." Addressing counsel once more, the court said, "Gentlemen, I'm going to lecture you now in front of the jury. I'm letting you know when there is an objection, I want both parties to stop. I don't want the parties to speak over each other and I don't want speaking objections. [¶] Is that clear, Mr. Evans? [¶] . . . [¶] Is that clear, Mr. Swarth?"

³ Henderson claims that the remarks were made continuously throughout the trial. However, this was a seven-day jury trial, and all the incidents cited by Henderson occurred on the sixth and seventh days.

A few minutes later, Swarth made an objection and asked for a sidebar. After a discussion outside the jury's presence, the court said to the jury: "I want to apologize on behalf of the attorneys. As we were back there, the pretty basic rules I had spoken of -- and both these attorneys know the rules if you have gone through law school. It's taught in law school. If you practice law for more than a day, you would know the rules. They cannot seem to abide by those rules so it is taking up additional time. So we have not accomplished what we had set out to do back there. We will be taking time this afternoon. It will cut into the jury trial, unfortunately. Both attorneys are acting up."

The noon recess was then taken, and, once the jurors had left the courtroom, the court again admonished counsel. The court stated: "I want to make it very clear on both sides, and I don't know how many times I have told both sides this already. But I let each side make their record. [¶] Mr. Swarth, I understand your frustration. I understand why you raise your voice. I will ask you, though, to keep your voice down when we are at sidebar because the jury can hear. [¶] Mr. Evans, I have asked you not to interrupt Mr. Swarth a number of times. We are going to make a clean record in this case and I'm telling both sides don't talk over each other. It's basic. Do not talk over each other. I let both sides make their records. When you are speaking, I don't let Mr. Swarth interrupt and vice versa."

After the noon recess, before the jury entered the courtroom, the court once again admonished counsel not to interrupt one another or to finish the question once an objection has been interposed. The court also stated, to make the record clear, that during the morning sidebar, "not only did Mr. Evans interrupt Mr. Swarth again but then Mr. Swarth responded by yelling what I thought was at the top of his voice."

Defense counsel then moved the court for a mistrial, alleging that the defendant had been prejudiced by the court's characterization of both defense counsel and the prosecuting attorney as "unprofessional." The court expressed its frustration once again with counsel's behavior and denied the motion.

Later that day, when Swarth was cross-examining Deputy Sheriff Jeffrey Knittel regarding a report prepared by Deputy Roger Izzo, he asked, “I would like to know whether this report contains any information about that larger operation.” After the court sustained its own relevance objection, Swarth asked, “The fact is, the report doesn’t contain any information about the larger operation, does it?” The court said, “Folks, excuse me again. Okay? [¶] Maybe I wasn’t clear in my ruling but I just indicated that what was in that report . . . was irrelevant. So for you then to go ahead and read or make certain assertions of what was in that report would not be proper. [¶] Folks, I will ask you to disregard the statements Mr. Swarth just made. I had sustained an objection, my own objection, indicating it was irrelevant. [¶] I’m sorry that this case is taking as long as it is, but we will try to get through it as quickly as possible.”

On the seventh day of trial, March 6, 2007, before the jury was brought in, Swarth argued that the just-quoted comments amounted to judicial misconduct, and asked that the jury be admonished. The court granted the request and admonished the jury as follows:

“Before we start off I want to instruct you that I had indicated to you that in court certain procedures have to be followed. And I had indicated that both attorneys had been acting in an unprofessional manner. I do want to admonish you that by saying that I in no way meant to imply that they were acting unethically or deceptively. The issue goes to talking over one another. That when the court makes a ruling, that all sides have to stop and not talk over each other. So you are not to infer in any way that the defendant is more guilty or less guilty from that. We just have two attorneys who are being very zealous in their representation and it is my way of holding all sides accountable and maintaining the decorum in this courtroom.”

Soon afterward, the testimony concluded, and, outside the presence of the jury, the court commented on the attorneys’ behavior and the allegation of judicial misconduct. The court stated that from the beginning of the trial the attorneys frequently interrupted each other and the witnesses, and that the court had asked counsel both in front of the jury and outside its presence to stop questioning once an objection was made. The court had asked both attorneys several times not to interrupt each other, and the court reporter

had also had to interrupt counsel a number of times to ask them to stop. The court stated that prior to admonishing counsel in front of the jury, it used a “sliding scale of remedies.” The court found that at the sidebar during which Swarth raised his voice, his yelling was loud enough to be heard by the jury. The court also found that while it was making the ruling regarding Deputy Izzo’s report, Swarth raised his voice and continued to speak. The court concluded that the cited facts were the reason that it admonished counsel in front of the jury and overruled counsel’s judicial-misconduct objection.

A defendant has the right, under the due process clause of the Fourteenth Amendment to the United States Constitution, to an impartial trial judge. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1111 (*Guerra*).) A “trial court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution.” (*People v. Carpenter* (1997) 15 Cal.4th 312, 353 (*Carpenter*).) Such judicial misconduct requires reversal when it rises to a level that communicates to the jury that defense evidence is not believed by the judge. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1233.)

However, “[i]t is well within [a trial court’s] discretion to rebuke an attorney, sometimes harshly, when that attorney asks inappropriate questions, ignores the court’s instructions, or otherwise engages in improper or delaying behavior.” [Citation.]” (*People v. Snow* (2003) 30 Cal.4th 43, 78 (*Snow*).) It is the judge’s duty “to control all proceedings during the trial, . . . with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.” (Pen. Code, § 1044.)

When a claim of judicial misconduct or bias is made on appeal, we review the record to determine whether “‘the appearance of judicial bias and unfairness colors the entire record.’ [Citation.]” (*People v. Geier* (2007) 41 Cal.4th 555, 614, fn. 16.) “[O]ur role . . . is not to determine whether the trial judge’s conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge’s behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.” [Citation.]” (*Snow, supra*, 30 Cal.4th at

p. 78.) It is Henderson’s burden on appeal to establish that the trial court abused its discretion in the manner used to control the proceedings. (See *Guerra, supra*, 37 Cal.4th at pp. 1111-1112.)

When applying an abuse of discretion standard, we defer to the court’s factual findings, if supported by substantial evidence. (*People v. Ayala* (2000) 23 Cal.4th 225, 282.) Because the trial court was aware that the written record would not show counsel’s many interruptions or the volume of their voices, it made factual findings. Henderson does not challenge those findings. Thus, he does not deny that both defense counsel and the prosecution frequently interrupted each other and the court, that they both made speaking objections after the court told them not to do so, or that defense counsel raised his voice within earshot of the jury.

“[A]n attorney ‘ . . . has, as an officer of the court, a paramount obligation to the due and orderly administration of justice. . . . ’ [Citation.] An attorney must not willfully disobey a court’s order and must maintain a respectful attitude toward the court. [Citations.] [¶] When, during the course of trial, an attorney violates his or her obligations as an officer of the court, the judge may control the proceedings and protect the integrity of the court and the judicial process by reprimanding the attorney. [Citations.]” (*People v. Chong* (1999) 76 Cal.App.4th 232, 243-244 (*Chong*).) Further, “‘when counsel defies the authority of the court in the presence of the jury, it is sometimes necessary to reprimand counsel in the presence of the jury.’ [Citation.]” (*Id.* at p. 244.)

Henderson suggests that the court’s comments, made after objecting to defense counsel’s cross-examination of Deputy Knittel, were discourteous and disparaging, because counsel felt humiliated. However, from this record, it appears that the lack of courtesy came from defense counsel, not the court. The court sustained its own relevance objection to the contents of Deputy Izzo’s report, and counsel raised his voice and interrupted the court in order to ask the same question phrased in the negative. We do not construe the court’s immediate rebuke as discourteous. Nor was it unnecessary, as the

court had, on many occasions, reminded counsel not to interrupt or raise his voice. Appropriate responses to inappropriate actions and remarks do not constitute judicial misconduct. (*Chong, supra*, 76 Cal.App.4th at p. 244.) When attorneys continue to engage in misconduct, the trial court need not excuse the jury repeatedly to admonish counsel. (*Ibid.*)

Upon reviewing the whole record, we do not find that the court's remarks tended "to discredit the defense or create the impression it [was] allying itself with the prosecution." (*Carpenter, supra*, 15 Cal.4th at p. 353.) The court did not embark upon a personal attack by belittling defense counsel and his witnesses, as in *People v. Mahoney* (1927) 201 Cal. 618, 624 (characterizing counsel's questions and objections as "silly," "idiotic," and "trivial"), cited by Henderson. Nor did the court display toward defense counsel a demeaning, patronizing attitude, as in *People v. Fatone* (1985) 165 Cal.App.3d 1164, 1176-1177, also cited by Henderson. The court reprimanded both counsel, and, no pattern of hostility toward one or the other can be discerned from the record. (*Fatone*, at p. 1175.)

The only arguably disparaging remark the court made to the jury was that "certain conduct was unprofessional and should not be done in court." This was clearly directed to both attorneys, and thus did not tend to discredit the defense or create the impression that the court was allying itself with the prosecution. (*Carpenter, supra*, 15 Cal.4th at p. 353.) Because the court's remarks were not unfairly directed at defense counsel, and thus unlikely to give the jury the impression that the defense evidence was not to be believed, or that the court was allying itself with the prosecution, Henderson has not established prejudicial misconduct. (*Snow, supra*, 30 Cal.4th at p. 78.)

Moreover, the next day, the court instructed the jury not to infer guilt from its remarks. The court explained that the "two attorneys [were] very zealous in their representation," that the court "in no way meant to imply that they were acting unethically or deceptively," and that the reprimand was the court's "way of holding all sides accountable and maintaining the decorum in this courtroom." We presume the jury

understood the admonishment and did not penalize Henderson for the court's remarks. (*Chong, supra*, 76 Cal.App.4th at p. 245; see also *People v. Waidla* (2000) 22 Cal.4th 690, 725.)

In addition, that afternoon, the court instructed the jury with CALJIC No. 17.30, which includes the following language: "I have not intended by anything I have said or done or by any questions that I may have asked or by any ruling I may have made to intimate or suggest what you should find to be the facts or that I believe or disbelieve any witness. [¶] If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion." Jurors are presumed to understand and follow the court's instructions. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.)

We conclude that the court's remarks did not amount to judicial misconduct. We further conclude that any prejudice resulting from the court's reprimands was dispelled by the instructions.

2. Substantial Evidence of Possession of Codeine

Henderson contends that the location of the acetaminophen and codeine tablets on top of the refrigerator in his home, without more, was insufficient evidence that the tablets were in his possession.

When a criminal conviction is challenged as lacking evidentiary support, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We must presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1019.) We do not reweigh the evidence or resolve conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

"The essential elements of unlawful possession of a controlled substance are 'dominion and control of the substance in a quantity usable for consumption or sale, with

knowledge of its presence and of its restricted dangerous drug character. Each of these elements may be established circumstantially.’ [Citations.]” (*People v. Martin* (2001) 25 Cal.4th 1180, 1184.) Possession may be constructive, shown by evidence that the defendant maintained control or the right to control the contraband. (*People v. Newman* (1971) 5 Cal.3d 48, 52, disapproved on another point in *People v. Daniels* (1975) 14 Cal.3d 857, 862.) “‘Possession may be imputed when the contraband is found in a location which is immediately and exclusively accessible to the accused and subject to his dominion and control’ [citation] or which is subject to the joint dominion and control of the accused and another [citations].” (*People v. Francis* (1969) 71 Cal.2d 66, 71.)

Here, the pills were found in the kitchen of Henderson’s home, on top of the refrigerator. The deputies also found bills and mail addressed to Henderson at that address. Although there were three other people in the apartment when the deputies entered, Henderson lived alone. The two other men were in the living room when the deputies entered, and the woman was in an upstairs bedroom, where she stayed occasionally. Henderson denied that the codeine tablets were his, but he did not claim that they belonged to any of the three people in his home that day. He claimed that they belonged to his friend Archie Brown, who had helped him move into his apartment 10 days earlier. Brown was not present in the apartment when the deputies searched it.

“The inference of dominion and control is easily made when the contraband is discovered in a place over which the defendant has general dominion and control: his residence [citations]” (*People v. Jenkins* (1979) 91 Cal.App.3d 579, 584.) Evidence that the controlled substance was found in open sight in the defendant’s home is sufficient to support a finding of possession. (*People v. Crews* (1952) 110 Cal.App.2d 218, 220.)⁴ Henderson’s admission that he lived alone and that the tablets had been in his

⁴ We reject Henderson characterization of the location of the pills as “above” the refrigerator and not in plain view. There was no evidence that the pills were enclosed in anything but a pill bottle, or that they were in a cupboard above the refrigerator. Deputy Knittel’s testimony that he recovered them from the top of the refrigerator reasonably permits the inference that they were not concealed.

home for 10 days was substantial evidence that he knew that the tablets were there and that they contained a controlled substance. (See *People v. White* (1969) 71 Cal.2d 80, 83.)

Henderson seeks a comparison with a half dozen cases in which constructive possession was not established; however, in none of those cases was the contraband found in the defendant's home. (See *People v. Johnson* (1984) 158 Cal.App.3d 850, 854-855; *People v. Glass* (1975) 44 Cal.App.3d 772, 776; *People v. Stanford* (1959) 176 Cal.App.2d 388, 391; *People v. Fernandez* (1959) 172 Cal.App.2d 747, 754-755; *People v. Tabizon* (1958) 166 Cal.App.2d 271, 273; *People v. Hancock* (1957) 156 Cal.App.2d 305, 309-310.) We therefore find those cases inapposite. We conclude that substantial evidence supports Henderson's conviction of possession of a controlled substance.

3. Multiple Convictions

Henderson contends that simple possession of a controlled substance is a lesser included offense of transportation of the same controlled substance. For that reason, he contends, his convictions of both possession (counts 6 & 7) and transportation (counts 9 & 10) of the same cocaine base and methamphetamine were improper.

"In general, a person may be convicted of, although not punished for, more than one crime arising out of the same act or course of conduct. 'In California, a single act or course of conduct by a defendant can lead to convictions "of any number of the offenses charged." [Citations.]'" (*People v. Reed* (2006) 38 Cal.4th 1224, 1226 (*Reed*), italics omitted; see also Pen. Code, § 954.) "A judicially created exception to the general rule permitting multiple conviction 'prohibits multiple convictions based on necessarily included offenses.' [Citation.]" (*Reed*, at p. 1227.)

A defendant can transport a narcotic without possessing it. (*People v. Rogers* (1971) 5 Cal.3d 129, 134 (*Rogers*).) Thus, possession of a narcotic is not a lesser included offense of transportation of the narcotic, and a defendant may properly be

convicted of both. (*People v. Watterson* (1991) 234 Cal.App.3d 942, 944-947 (*Watterson*).)

Henderson cites dictum in *Rogers* that suggests that a defendant may not be convicted of both possession and transportation, if, under the facts of the particular case, possession is incidental to, and a necessary part of, the transportation. (See *Rogers*, *supra*, 5 Cal.3d at p. 134, fn. 3.) However, the cited language in *Rogers* describes an outdated test. (*People v. Murphy* (2007) 154 Cal.App.4th 979, 983-984; see also *Reed*, *supra*, 38 Cal.4th at p. 1229.) More recently, the California Supreme Court concluded that the determination of what constitutes a lesser necessarily included offense for purposes of the multiple conviction bar *should* be based solely on the statutory elements test. (*Reed*, at p. 1229.) Under the statutory elements test, a lesser offense is necessarily included in a greater offense if all the legal elements of the lesser offense are included in the legal elements of the greater offense, so that the greater offense cannot be committed without necessarily committing the lesser offense. (*Id.* at pp. 1226-1227; *People v. Montoya* (2004) 33 Cal.4th 1031, 1034.)

Applying the statutory elements test, we find no possession element in Penal Code section 11352 or section 11379, the two transportation offenses. Thus, we conclude that possession is not a lesser necessarily included offense of transportation, and Henderson's convictions were proper. (*Watterson*, *supra*, 234 Cal.App.3d at p. 947.)

4. Assistance of Counsel

Henderson contends that the judgment must be reversed because of ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness when judged under prevailing professional norms, and that he or she was prejudiced by counsel's deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692 (*Strickland*).) To establish prejudice, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the

result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Id.* at p. 694.)

Ordinarily, when there is an insufficient showing of prejudice, the reviewing court need not determine whether counsel’s performance was deficient. (*Strickland, supra*, 466 U.S. at p. 697.) Here, Henderson has made no claim of actual prejudice. Instead, he invokes the rule of presumed prejudice applicable when counsel has been “totally absent.” (*United States v. Cronic* (1984) 466 U.S. 648, 658-659 & fn. 25 (*Cronic*).) However, rather than demonstrating that counsel was totally absent, Henderson argues that because White did not present an argument at the final sentencing hearing, he was *constructively* absent.

Henderson quotes a footnote in *Cronic* as support for this constructive absence theory. There, the Supreme Court stated, in part: “‘In some cases the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided. Clearly, in such cases, the defendant’s Sixth Amendment right to ‘have Assistance of Counsel’ is denied.’ [Citation.]” (*Cronic, supra*, 466 U.S. at p. 654, fn. 11.) This footnote was not a definition of “totally absent” or the enunciation of a rule of constructive total absence. However, later in its opinion, the Supreme Court explained that “if counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.” (*Id.* at p. 659.)⁵ Since *Cronic*, the Court has made it clear that the exception enunciated was a narrow one: “[T]he attorney’s failure must be complete.” (*Bell v. Cone* (2002) 535 U.S. 685, 697 (*Cone*).)

Henderson has not shown that White’s failure was complete. Henderson contends that counsel did no more than submit the matter on his argument made 17 days earlier, in which he admitted that he did not know of which charges Henderson had been convicted.

⁵ A third circumstance relieving the defendant from establishing prejudice occurs when counsel is required to represent the defendant under circumstances that would prevent even competent counsel from doing so. (*Cronic, supra*, 466 U.S. at pp. 659-661.)

The most White did at the final sentencing hearing, Henderson argues, was to calculate custody credits, which the court was obligated to do in any event by Penal Code section 2900.5.

It is undeniable that White did little to represent his client. However, in the previous hearing, White objected to the probation report and obtained a continuance of more than two weeks for the preparation of an updated report. Further, the record does not show what counsel may or may not have done between January 11, and January 28, to prepare for the final sentencing hearing, or why he chose not to argue. White had, prior to the final hearing, received the updated probation report and Swarth's file, and the court had suggested he obtain minute orders from the court's file. White did not claim that he was still ignorant of the verdicts.⁶

The facts in this case are similar to those in *Cone*, where defense counsel was present, but failed to perform in significant respects. (See *Cone, supra*, 535 U.S. at pp. 692, 694.) There, counsel waived final argument and made no case for mercy in response to the prosecutor's call for the death penalty. (*Ibid.*) The Court held that counsel's failings were "plainly of the same ilk as other specific attorney errors we have held subject to *Strickland*'s performance and prejudice components." (*Id.* at pp. 697-698.)

The California Supreme Court has also refused to presume prejudice in a case in which defense counsel provided only minimal assistance, because counsel was not "totally absent." (*In re Avena* (1996) 12 Cal.4th 694, 727.) We similarly conclude that, however deficient counsel's performance may have been, his absence was not *complete*. Thus, Henderson was required to show prejudice by establishing that counsel's failures rendered the proceeding fundamentally unfair. (*Id.* at p. 721.)

⁶ Ordinarily, the defendant must raise the ineffective assistance of counsel in a habeas corpus proceeding when essential facts do not appear in the record. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

Henderson contends that counsel abandoned him by making no argument on his behalf at the sentencing hearing, but he does not suggest what sort of argument might have produced a different result. The court denied probation, but was required by law to do so. (See Pen. Code, §§ 667, subd. (c), 1170.12, subd. (a)(2).) The court then chose the most serious offense, furnishing cocaine base to a minor, as the base term, and selected the middle term for that offense. (Health & Saf. Code, § 11353; count 4.) The court then doubled the term due to Henderson's prior felony conviction, as was also required by law. (Pen. Code, §§ 667, subd. (e)(1), 1170.12, subd. (c)(1).) Henderson does not suggest that counsel could have successfully advocated the low term, instead of the middle term. Indeed, the probation report provided more than ample justification for the middle term, showing an extensive 19-year adult criminal history. (*People v. Black* (2007) 41 Cal.4th 799, 818; Cal. Rules of Court, rule 4.421(b).) Finally, on all remaining counts except count 2, the court imposed, but stayed, concurrent terms. The court imposed a fine as to count 2, and suspended it.

Henderson does not suggest just how counsel might have advocated for a more advantageous outcome. On this record, we cannot find that counsel's failures rendered the proceeding fundamentally unfair. (*In re Avena, supra*, 12 Cal.4th at p. 721.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAUER, J.*

WE CONCUR:

FLIER, ACTING P.J.

BIGELOW, J.

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.